

**Donald R. Bogard, an Independent Contractor and  
Russell J. Stokes Jr. Cases 15-CA-10490 and  
15-CA-10684**

December 10, 1990

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On March 29, 1990, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision.

The judge found that the Respondent's owner, Donald R. Bogard, in conversations with three employees during the week prior to a representation election,<sup>2</sup> made implied promises of unspecified benefits and of a vacation plan if the employees voted against union representation. Specifically, about a week before the election, Bogard approached employee Joel Nelson while he was working and asked him if he was going to participate in the election. When Nelson responded he would not participate, Bogard stated, "I need you to come because I need your vote. Things will get better whenever everything is over." During this same period, Bogard asked employee Robert Dicks if Dicks knew that the election was coming up. When Dicks responded affirmatively, Bogard said, "Stick with me, things will get better." On the day before the election, Bogard told employee Staray Nelson that he would like Staray and his brother Joel to vote for him. Bogard then stated, "I know you have worked hard and need a vacation. As soon as all this is settled, I have a plan."

Although finding that the Respondent had made impermissible implied promises of benefits in these three conversations,<sup>3</sup> the judge concluded that the conduct was insufficient to warrant the issuance of a remedial order.<sup>4</sup> In this regard, the judge concluded the conduct

involved "context-free promises of an ambiguous nature made during Respondent's mild, ineffectual election campaign and were free from threatening or other seriously coercive conduct." The judge also relied on the Union's overwhelming victory in the election, its success in a subsequent 3-month economic strike, and the fact that the Union and the Respondent had entered into a collective-bargaining relationship. Thus, the judge concluded that the "purposes of the Act have been achieved . . . and the interests of the employees and the public under the Act have been satisfied." Accordingly, the judge dismissed the complaint in its entirety.

The General Counsel has excepted to the judge's finding that the Respondent's statements described above were insufficient to warrant a remedial order. We find merit in the General Counsel's exceptions.

The judge's own findings establish that unlawful promises were made to almost one-fifth (3 out of 16) of the unit employees. Further, contrary to the judge's finding that the statements were "context-free," we note that the Respondent made each of its promises in the context of soliciting votes against the Union. These promises were made by the Respondent's owner directly to employees on a one-to-one basis. Accordingly, we find that this conduct violated Section 8(a)(1) and that it will effectuate the purposes of the Act to issue our usual remedial order for the violation.<sup>5</sup>

**ORDER**

The National Labor Relations Board orders that Donald R. Bogard, An Independent Contractor, Baton Rouge, Louisiana, his officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees unspecified benefits and a vacation plan if they vote against union representation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Baton Rouge, Louisiana facility copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

<sup>1</sup>No exceptions were filed to the judge's dismissal of complaint allegations involving interrogation, threats, changed work schedules, and the suspension and discharge of employee Leathers.

<sup>2</sup>The Union won the election and was certified as the unit employees' collective-bargaining representative on August 11, 1989.

<sup>3</sup>The Respondent has not excepted to the judge's finding that the Respondent promised unspecified benefits and a vacation plan if the employees rejected the Union and that these allegations of the complaint were "proven."

<sup>4</sup>The judge also found that this conduct was insufficient to justify vacating the settlement agreement in Case 15-CA-10490. No exceptions have been filed to that finding.

<sup>5</sup>See *Kal-Die Casting Corp.*, 221 NLRB 1068 (1975); *Carolina American Textiles*, 219 NLRB 457 (1975).

<sup>6</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED, that the settlement agreement in Case 15-CA-10490 is reinstated.

IT IS FURTHER ORDERED, that the complaint is dismissed insofar as it alleges violations not specifically found.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

I WILL NOT promise my employees unspecified benefits and a vacation plan if they vote against union representation.

I WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DONALD R. BOGARD, AN INDEPENDENT  
CONTRACTOR

*Joseph B. Morton, III, Esq.*, for the General Counsel.  
*James D. Thomas II, Esq. (Wall, Thomas, Riche & Wall)*, for the Respondent.  
*Russell J. Stokes Jr.*, of Baton Rouge, Louisiana, pro se.

## DECISION

### STATEMENT OF THE CASE

THOMAS R. WILKS Administrative Law Judge. The trial of the issues in this consolidated proceeding was held before me in Baton Rouge, Louisiana, on July 17, 18, and 19, 1989, pursuant to unfair labor practices filed and/or amended according to numerical sequence on January 5, February 9, September 15, and October 24, 1988, by Russell J. Stokes Jr., an individual, against his employer, Donald R. Bogard, an Independent Contractor (Respondent), and pursuant to an

order consolidating cases and vacating settlement agreement; consolidated complaint dated October 27, 1988, alleging violations of Section 8(a)(3) and (1) of the Act.

An unfair labor practice charge was filed against Respondent by Amalgamated Transit Union Local 1600, AFL-CIO (the Union) in Case 15-CA-10829 on March 20, 1989, on which a subsequent complaint was issued and consolidated with this matter wherein it was alleged that Respondent violated Section 8(a)(1) and (5) of the Act by various breaches of its bargaining obligations with the Union which, pursuant to a Board-conducted election, had been certified on August 11, 1988, as exclusive employee bargaining unit representative.

Answers which denied the commission of unfair labor practices were timely filed by Respondent. Thereafter, the Union and Respondent entered into a non-Board resolution of the 8(a)(5) allegations and, pursuant to the Union's request, the Regional Director on July 14, 1989, issued an order severing Case 15-CA-10829 from the proceedings and approving withdrawal of the Union's unfair labor practice charge.

The complaint in Case 15-CA-10490 alleged that the Respondent: (a) in August and September 1987 on numerous occasions, interrogated employees concerning their union activities and sentiments; (b) in early August 1987, threatened employees by stating that he would not tolerate employees dealing with a union; (c) in August 1987, interrogated employees concerning their and other employees' union activities and threatened termination if employees continued to support unions; (d) in late December 1987 or early January 1988, interrogated employees concerning union activities and threatened to lay off any employees who supported the Union; (e) in late January 1988, interrogated employees about their union activities and knowledge of charges filed in this case; (f) on January 12, 1988, informed an employee that another employee (Stokes) had been laid off in September 1987 because of his support of the Union. The original complaint further alleged that Respondent discharged Stokes because of his union activities or other concerted protected activities. These allegations, which are found in paragraphs 7(a-f) and paragraphs 8 and 13 of the consolidated complaint, were resolved by an informal settlement agreement approved by the Regional Director on April 27, 1988. The General Counsel contends that Respondent subsequently violated the terms of the settlement agreement by the conduct alleged in Case 15-CA-10684 wherein it is alleged in paragraphs 7(g-i) and 9-14 that Respondent Bogard, in July 1988, promised more work hours and other unspecified benefits to employees if they voted against the union; on August 2, 1988, promised employees vacations if they voted against the Union on September 12, 1988, told employees that he would not bargain in good faith with the Union and that union representation was futile; threatened a change of work schedules and reduction of hours because of their union activities and because they gave affidavits in a prior Board case, informed employees that a fellow employee's work hours had been reduced and he had been discharged because of his union support and because he had given an affidavit in the prior Board case; on January 3, 1988, suspended employee Scott Leathers; on June 10, 1988, reduced Leathers' work hours; on September 11, 1988, discharged Leathers; and, finally, on September 15, 1988, changed the work

schedule of employee Larry Moore. The adverse action toward Leathers and Moore is alleged to have been caused by their union and other concerted protected activities and also because they had given to the Board affidavit testimony in Case 15-CA-10490.

The foregoing alleged subsequent violations are argued to warrant the Regional Director's vacation of the prior settlement agreement. The General Counsel in support thereof appropriately cites *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Deister Concentrator Co.*, 253 NLRB 358 (1980); *YMCA of Pikes Peak Region*, 291 NLRB 141 (1988). The parties recognize, however, that the threshold issue before me is, as it was in the cited Board decisions, whether subsequent violations justified settlement vacations or whether, as in the *Deister* case, the settlement agreement ought to be reinstated regardless of subsequent violations. Clearly then, the subsequent complaint must be adjudicated in the context of all admissible background evidence prior to an adjudication of the settlement vacation propriety. Rather than bifurcate this proceeding as argued by Respondent, I decided that the limited nature of circumstances of this case and the interests of judicial economy justified the litigation of all the complaint allegations in one session.

At the trial, all parties were provided opportunity to adduce relevant evidence on all the issues raised by the consolidated complaint. Thereafter, on September 15, 1989, posttrial briefs were received from the General Counsel and Respondent. The General Counsel's motion in the brief, to withdraw complaint paragraph 7(g)(ii) re the July 1988 promise of more work hours as unsupported by record evidence, is granted.

On the entire record and briefs, and my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. RESPONDENT'S BUSINESS

At all times material, Respondent, a sole proprietorship doing business as Donald R. Bogard, an Independent Contractor, with an office and place of business in Baton Rouge, Louisiana (Respondent's facility), has been owned by Donald R. Bogard and has been engaged in the interstate and intrastate transportation of passengers and freight. During the 12-month period ending September 30, 1988, Respondent, in the course and conduct of these business operations within the State of Louisiana, derived gross revenues in excess of \$50,000 for the transportation of passengers and freight and commodities in interstate commerce pursuant to arrangements with and as agent for various common carriers, including Greyhound Lines, Inc., which operates between and among various States of the United States. By virtue of these operations described, Respondent functions as an essential link in the transportation of passengers and freight and commodities in interstate commerce. During the 12-month period ending September 30, 1988, Respondent, in the course and conduct of these business operations, performed services valued in excess of \$50,000 in States other than the State of Louisiana.

It is admitted, and I find, that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION

It is admitted, and I find, that the Amalgamated Transit Union, AFL-CIO, Local 1600 (the Union), is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

##### III. ALLEGED UNFAIR LABOR PRACTICES

###### Background

Prior to July 1, 1987, as the commission agent for Continental Trailways, Respondent managed the Trailways Bus station located at 717 Convention Street in Baton Rouge, sold tickets and shipped packages and freight. In July 1987, Greyhound Lines, Inc. acquired Trailways and retained Respondent as the commission agent for the Convention Street station. On or about August 3, 1987, Greyhound informed Respondent that it had decided to merge Respondent's facility with the Greyhound Main Baton Rouge terminal, which is located at 1253 Florida Street in Baton Rouge, which was then being operated by independent contractor Rollin Cable. Respondent was further notified that he had been selected to serve as the commission agent for the merged facility to be situated at the Florida Street terminal.

Prior to the merger, Cable's Greyhound operation had been successfully organized by the Union through Stokes' active solicitation of the Florida Street facility's coworkers. Pursuant to a Board-conducted election, the Union became the Florida Street facility employees' designated bargaining agent. The merger of the two facilities by Greyhound interrupted contract negotiations. Respondent refused recognition as a successor employer, after it had acquired control of the Florida Street facility at 12:01 a.m. August 5, 1987. Respondent initiated the Florida Street operations under what he described as chaotic conditions with his former Convention Street terminal employees: Frank Toussaint, Robert Stanley, Charles Guillory, Darla Bogard, Brigitte Bogard, Staray Nelson, and Belle Hall. Respondent also immediately "on the spot" hired Assistant Terminal Manager Nolan Hills; and Larry Moore, Scott B. Leathers Jr., and Ruby Lewis, former cable employees who happened to be on duty at the moment of merger.

On the same day, Stokes, Larry Turner, Aubrey Raymond, Henry Stone, and Robert Dicks, former Cable employees, requested but were refused retention. On August 10, 1987, Respondent hired Ed Poole, Mike Wheeler, Joel Nelson, and Emmitt Redden. Thereafter, Stokes, Dicks, Turner, Raymond, and Stone began picketing in front of the Florida Street terminal, protesting Respondent's refusal to hire them while hiring new employees. Among those Cable employees retained by Respondent, Moore and Leathers were platform workers employed on the night shift. Respondent testified that he found Florida Street in a filthy condition and therefore his immediate need was for unskilled cleanup people. He testified that he took applications from the former Cable employees and decided to evaluate the state of the merged business volume before hiring further terminal operational employees. In the meantime, Stokes, a Cable employee of 13 years' experience, and the group of former unretained Cable employees commenced picketing in protest at the Florida Street facility where their actions caught the eye of the television news cameras.

On August 17, 1987, Respondent hired Stokes, Turner, Raymond, Stone, and Dicks.

As platform worker, i.e., baggage clerk, Stokes' duties included loading and unloading buses and also, as an express agent, he billed and packaged freight. Within days of his hire by Respondent, Stokes began soliciting employees and support for the Union in private conversations while the employees were working or eating lunch at the nearby Crazy Bob's Restaurant, or before and after work. Stokes contradicted himself as to whether he wore observable union insignia at this time. Stokes also signed a union card on or about August 17, 1987.

On September 11, 1987, Stokes and Wheeler were laid off by Respondent on the proffered explanation of a downturn in business after the Labor Day holiday and the cessation of the summer vacation travel season. Stokes admitted that business did slack off to some extent.

During his layoff, Stokes immediately commenced visitation of the facility to talk to the employees whenever he could. Stokes testified that on one such visitation he appeared at the terminal employee bulletin board to post some union material when he was approached by Bogard and asked what he was doing there. Stokes testified that he replied that inasmuch as he, a laid-off employee, had 13 years' Greyhound experience, he had just as much right to be there as Greyhound newcomer Bogard, albeit the latter was the terminal manager and his employer.

Stokes testified that he had become convinced that Respondent had laid him off because of his union activities prior to and after the merger. He filed unfair labor charges which, after an investigation, were dismissed for insufficient evidence. Thereafter, he consulted an attorney who advised him as to what he needed to do and that he thereupon commenced to do what needed to be done. Stokes admitted that secret taping under misrepresentations was his own idea. He testified: "I was trying to get evidence in any kind of way." Stokes testified that he then, with the assistance of a relative and a friend, undertook a series of covertly tape-recorded conversations of Bogard, Hills, and coworkers to obtain evidence of discriminatory motivation. He testified that it was his plan to induce Bogard and Hills to unwittingly incriminate Respondent by these deceptive stratagems.

The only result of these undercover efforts resulted in an allegedly borderline incriminating statement by Hills, whose status as a supervisor with admittedly extremely limited discretionary authority, if any, is disputed. Hills is a 10-year, "good enough" friend and confidant of Stokes, who admitted that during one of his secretive tapings, told Stokes that he did not "know the ins and outs of it, because they don't trust him [Hills]."

In another covert taping by Stokes' sister-in-law who, at Stokes' direction, misrepresented herself to Bogard as a prospective employer, Bogard recommended Stokes to the bogus employer as a good worker.

There is also disputed evidence as to Respondent's conversations with employees concerning Stokes' union activities which form the basis of 8(a)(1) allegations in the first complaint.

A new charge was filed on January 5, 1988, and the first complaint issued thereafter. A trial was scheduled for April 27 but was canceled because of the April 26 settlement, which Stokes testified that he entered reluctantly against his

better judgment. Stokes testified that he received about \$3725 in backpay which was for less than the over \$9000 that he thought was due him. Bogard testified that Stokes was due for seasonal recall in any event. Stokes was reinstated on or about May 1, 1988, to the day shift where he displaced Henry McWilliams to the night shift.

In June or July 1988, the Union filed with the Regional Director a Petition for Certification of Representation. Consequently, a Board-conducted election was held on August 3 at which of 16 valid ballots, 14 voted "yes" and only 2 voted "no." On August 11, the Union was certified as exclusive collective-bargaining representative of Respondent's platform workers, ticket agents, pickup/delivery, sales agent, and janitorial employees. Subsequently, in support of their bargaining demands, unit employees engaged in a 3-month strike, in which they were initially joined by alleged Supervisor Hills.

#### Case 15-CA-10684

Leathers testified that when he was interrogated by Bogard as to whether Stokes or platform worker Turner had talked to him regarding the Union in September or November in 1987, he replied negatively. Leathers testified that his interest in union representation did not arise until months later and that Bogard was unaware of his newly acquired pronoun sympathies. Bogard claimed ignorance of any personal union involvement by Leathers.

Leathers had given an affidavit to the Board agent during the investigation of Case 15-CA-10490 and on April 20, 1988, was subpoenaed by the General Counsel to testify at the trial scheduled for April 27. About 10 days before the trial, according to Leathers' testimony which was admitted by Bogard, he, Moore, Poole, and employee Joey Nelson were approached in the work area by Bogard and were asked if they would testify on his behalf at the upcoming trial and that he might want them all as witnesses. Leathers testified that none of them answered with a direct "yes" or "no" answer but that they collectively stated to Bogard that they would tell the truth. Bogard did not discuss with them the nature of their prospective testimony on his behalf but returned to his office. It is undisputed that on April 26, Bogard told the aforesaid employees that he settled the case and that they did not have to testify. What is disputed are alleged references by Bogard to the employees' involvement as government witnesses.

Leathers' testimony as to Bogard's April 26 comments is inconsistent, confusing, and marked by a demeanor of uncertainty. He first testified that Bogard approached him and Stokes together at the loading platform and demanded to know whether they had given statements to the Board in the case and that they then were told that the case was settled and they would not need to testify. When asked to repeat his account, still in direct examination, he testified that Bogard approached and announced that he knew that they had given statements to the Board, which disclosure "surprised" and "shocked" him because it had been a closely guarded secret. In cross-examination, his testimony was as follows:

Q. Now, you said that the day before the case was scheduled for trial he told you that you didn't have to go to the [trial]?

A. He told Larry Moore and I that we didn't have to go, even though we had statements, that we didn't have to go.

Q. Now, wait, he said what now?

A. He said that we didn't have to go to court. He had already settled up with Russell Stokes the day before the court.

The very last response accords with Bogard's testimony. Moore's testimony provides yet another version. He recalled Bogard's first solicitation for employee testimony on his behalf. According to him and contrary to Leathers, both he and Poole explicitly refused and, further, both he and Poole volunteered to Bogard that they had already been subpoenaed. (Bogard denied that Moore revealed that he had been subpoenaed.) Further, Moore testified that the remaining employees explicitly refused on the grounds that they did not desire any involvement in the case. Moore testified that the day before the trial, he and Leathers asked Bogard for time off to testify, whereupon Bogard told him, "Hey, no, you don't have to go to court; everything has already been settled." According to Moore, nothing more was said that he could recall. Moore testified that prior to April 26, he kept secret his pronoun sympathies which he presumed had not become known to Bogard until the result of the subsequent August election and the arithmetic of the vote, i.e., the two "no" votes were outspokenly proemployer. Moreover, he admitted that the pretrial conversation with Bogard regarding his prospective testimony did not cause any change in Bogard's preexisting friendly demeanor toward him.

Leathers also testified that Bogard continued to manifest a friendly and benign attitude toward him. As an example, shortly after the April 26 trial conversation, Leathers incurred a back injury which was one of three work-related physical injuries which caused him substantial loss of worktime. Leathers testified that Bogard treated him "real nice" and was solicitous of his recovery progress. According to Leathers, the friendly relationship with Bogard dissipated when Leathers accused Bogard of submitting a false statement to an insurer with respect to the processing of an earlier work-related injury compensation claim on behalf of Leathers.

No other employee testified on the issue of the NLRB investigation involvement of Moore and Leathers. Because of the inconsistency of Moore's and Leathers' testimonies, Leathers' poor demeanor, and Moore's credibility deficiencies to be discussed more fully hereafter, I must credit Bogard's testimony on this issue. I conclude that the evidence to this point fails not only to establish animosity of Bogard to Moore and Leathers for their involvement in Stokes' prior case or their own union activity but also fails to establish his knowledge of it as of April 26, 1988.

Thereafter, Leathers and Moore allegedly suffered acts of discriminatory treatment. Leathers received a 3-day suspension on June 3, 1988, following a failure to report for work. It is disputed whether prior to that on or about May 30 suspension, Leathers had asked for and was denied a leave of absence or whether he asked Bogard to prepare a letter of recommendation for him to be used in seeking employment in Detroit, Michigan, to avoid in-law problems as testified by Bogard. It is also disputed whether Leathers' failure to appear at the commencement of the shift in proper attire and to remain for the full shift after his appearance in street

clothes with his wife at 10 a.m. was attributed to Leathers' willful disobedience or to Bogard's implied permission. Thereafter, on his return to duty on June 10, Leathers' hours were reduced to 16 hours per week from 40 hours per week, ostensibly because of Bogard's exasperation with Leathers' alleged failure to comply with Bogard's instructions to correct a poor attendance record and a habit of unauthorized early departure from work. It is disputed whether Leathers nonwork-related injury absences were authorized and also whether Leathers was admonished about it. Leathers testified that he was never even counseled by Bogard about any kind of work-related matter.

Respondent witness Frank Toussaint testified credibly as to a running dispute with Leathers over whether each of the other was avoiding his fair share of the work and in particular to one incident when he complained, as he had frequently done before, to Bogard about Leathers' alleged malingering. In rebuttal testimony, Leathers essentially admitted in corroboration of Toussaint that the incident occurred, that Bogard counseled him, and that, in consequence, he apologized to Toussaint. He thus contradicted a most vigorous denial that Bogard "ever" counseled him.

On September 11, Leathers was discharged. It is disputed as to what exactly he was told were the reasons. His written notification merely stated the failure to follow instructions. Bogard testified in a less than fluent manner as to having reached the decision on the basis of Leathers' cumulative work record of poor attendance, improper attire, e.g., dress shoes which endangered safety, and work malingering which he described as a refusal to follow his ongoing corrective orders. Leathers denied that he had frequently complained to Bogard of his domestic in-law problems, which Bogard assumed were the cause of Leathers' manifestation of perceived mental depression and lack of work enthusiasm. Bogard testified that he had agreed to give Leathers a letter of recommendation despite a deterioration in his work performance and work-oriented attitude because he assumed that relocation away from the domestic problems would restore Leathers to his past good work performance.

Leathers admitted that he needed time away from his work, "to get myself together." He testified, "I was looking for a part time job, really." However, he denied the reference to any domestic in-law problem and asserted that he was "happily married." The "request for leave of absence" document that Leathers and his wife prepared and presented to Bogard on May 31, which he refused to sign and disclaimed any prior agreement to sign, stated in part:

I am forced to do so due to extenuating circumstances of a personal and emergency nature. I have a family crisis [that] demands my full attention.

That crisis was never explained.

Although there is much in dispute, the evidence reveals that Leathers did have some sort of ongoing domestic problems, that his interaction with his platform coworkers resulted in disputes which involved Bogard's intervention, that he was work-related injury prone, that he had a workers compensation dispute with Bogard, and he did have an absenteeism record. Although Toussaint did not have a 100-percent attendance record, he testified that his early depart-

tures, often of an hour or less, were arranged for with 3 days' advance notification to Bogard.

Moore's problems began, according to him, after the election when, he testified, Bogard's friendly demeanor disappeared and was replaced by a constant observation and criticism of his work. Bogard admitted that he did increase his criticism of Moore and that this was caused by a deterioration in Moore's work performance after the election. Bogard testified, without controversy, that Moore had become depressed over a personal financial problem evidenced by Bogard's receipt of Moore's creditors' telephone calls. Moore admitted that on past occasions he found it necessary to borrow money from Bogard.

Moore testified, without corroboration, that after the election he was the only employee who was assigned to cut grass, whereas before the employees rotated in that duty. Moreover, he claimed that he was now cutting grass during the hottest part of the day instead of the usual cool morning hours. The number of these incidents and their duration is left to speculation. No foundation was given for his conclusion that only he cut grass after the election. Moreover, cutting grass is done like other maintenance, at times dictated by the bus arrival schedule.

Moore testified that on September 15, his work schedule was changed from a Monday through Friday workweek, 7 a.m. to 3 p.m. shift, to a Wednesday through Sunday week and that on September 22, his shift was changed to noon to 8:30 p.m. Moore assumed that the shift change was calculated to make it difficult for him to commute to work because of the unavailability of public transportation at the late hour. When he complained, he testified that Bogard offered to arrange for his financing of a used automobile purchased by Bogard's intervention with a friend. Bogard testified, in general conclusionary terms, that because of an unspecified deterioration of Moore's work and work-oriented attitude, it was necessary to arrange his shift so that he would work more closely with "someone." He did not explain. He denied antiunion or anti-NLRB involvement motivation.

#### Evidence of Animus and Discriminatory Motivation

The General Counsel's case for knowledge, animus, and unlawful motivation with respect to the adverse actions against Leathers and Moore is founded chiefly on the testimony of Moore. There is also testimony from other employees as to Bogard's comments made during the preelection campaign.

The General Counsel in the brief asserts that Respondent began an "antiunion campaign" about 1 week before the election. A review of the evidence reveals that Bogard's campaign was a rather mild effort compared to what Bogard told Moore on prior and subsequent occasions if Moore is to be believed. As to the week before the election, the General Counsel relies on the following:

Robert Dicks testified that 1 week before the election, Bogard approached him in the freight office. Bogard asked Dicks if he knew that the election was coming up. When Dicks responded affirmatively, Bogard said, "Stick with me, things will get better." Joel Nelson testified that in July, Bogard approached him while he was working on a bus and asked him if he was going to participate in the election. When Joel replied no, Bogard said, "I need you to come because I need your vote. Things will get better whenever ev-

erything is over." He could not recall if anything else was said. Staray Nelson testified that on August 2, the day before the election, Bogard talked to him in the express room. According to Nelson, Bogard stated that he would like Staray and his brother Joel to vote for him. Bogard then stated, "I know you have worked hard and need a vacation. As soon as all of this is settled, I have a plan."

In cross-examination, Dicks and Staray Nelson agreed that Bogard did not make any threats. Dicks admitted that Bogard also stated to him on another occasion that he would vote any way he wanted to but that Bogard asked him to "think about" voting for Bogard. In direct examination, counsel for General Counsel asked Staray Nelson his "impression" of Bogard's preelection comment. He answered that it was "just conversation, you know." In cross-examination, he was asked whether Bogard had made a preelection promise and he answered, "[N]o, he never made a promise." In cross-examination, Respondent asked Staray Nelson whether Bogard had ever talked to him about Stokes' union involvement. He answered that on one occasion: "He asked me had Stokes talked to me at work" and "He asked me had Stokes been talking to me about the Union" and that this occurred on some unspecified date after his return from layoff. The incident was not alleged in the complaint. No context for the conversation was given nor the circumstances established, and thus no determination as to the coercive nature of it can be made despite the General Counsel's allusion to it in the brief.

Bogard admitted the "things will get better" comments, but denied having made any promise with respect to vacations. Bogard testified that he meant that things would improve in that the disruption of the campaign would cease but admitted that he did not explain this to the employees.

Stokes confirmed that despite his assiduous monitoring of Bogard's electioneering, the most he ever heard was that Bogard merely asked for their votes and that no threats were made to any employee.

#### Moore's Testimony

The conduct attributed to Bogard by Moore appears to be uncharacteristic of the type of conduct indicated in the testimony above and also indicated in the testimony of other witnesses with respect to the presettlement 8(a)(1) violations, i.e., interrogations related to Stokes' union activities. Moore's testimony tends to depict Bogard as virulently and vindictively antiunion and forms the essential foundation for the 8(a)(3) and (1) violations alleged in Case 15-CA-10684, as well as a significant element in the 8(a)(1) and (3) violations alleged in the first case.

Moore testified that in August 1987 prior to Stokes' layoff, suddenly within the context of a private social conversation at the facility, Bogard announced that he would "not tolerate this union deal." When asked to repeat the conversation, he added an interrogation of Stokes concerning Stokes' union activities with a prediction of Stokes' termination. In cross-examination, his account was further augmented and enhanced with much stronger and explicit threats. When confronted with his affidavit dated February 1988, he admitted that he testified therein that the incident occurred not in August 1987 but a half-year later in January 1988. Moore admitted confusion as to the dates. The timing, however, was critical, i.e., January was long after Stokes'

layoff. This testimony is symptomatic of Moore's tendency to change, add, and embellish facts whenever asked to repeat his testimony.

Moore's testimony as to an alleged rooftop confrontation with Bogard on September 12, 1988, forms the essential premise for a finding of animus, knowledge, and unlawful motivation with respect to the alleged violations against himself and his cousin Leathers. Moore was certain of the date which was fixed in his affidavit because he specifically related it to the day after repairs were allegedly done to the terminal rooftop drainage system. According to Moore, Bogard summoned him up to the roof to show him the repairs and then proceeded to declare that he (Moore) and Leathers had cost him money and embarrassment; that he would "not take this lying down"; that he would resort to "every chance" to change Moore's shift; that he would do what he had to do; that he had "one down and two to go"; that he already cut Leathers' hours; that he would engage in regressive, unending collective bargaining, that the employees would have to strike; that Moore should consider himself fortunate as he had a full 40-hour workweek contrasted with Leathers' part-time schedule; and that although Moore was a good worker, "sometimes the good have to suffer."

In cross-examination, Moore again added and embellished his recollection of the incident. As he testified, Moore warmed up to his subject and animatedly narrated the sequence of alleged statements. The stark threat to a submissive listener originally described now took on the flavor of a heated context of words and will between Moore and Bogard. In the second version, Bogard now emotionally invoked the invincibility of Greyhound, i.e., it would "keep on rolling." Now Moore told Bogard outright that he was "disgusting" and that Moore would report the incident to the Board but that Bogard smugly alluded to the lack of witnesses on the rooftop.

Despite his alleged challenge to Bogard about reporting the incident and although he considered Bogard to be "just plain disgusting" and although by that date, having now worn union insignia since May 1988, he had no reason to restrain his show of union support as it had already been well known to Bogard, and although Stokes had testified that early on in his case he had urged Moore, his close friend, to give statements to the Board, Moore testified forcefully and with every outward display of sincerity and assuredness in demeanor that he reported the rooftop incident to no one except counsel for General Counsel. He insisted that he did that only when he came to Moore during the investigation and obtained Moore's pretrial affidavit with the assistance of another Board agent. Moore again insisted that although he met with a union agent after the rooftop encounter, he still did not reveal it to anyone else. He went even further and denied having discussed this case at all with Stokes or Leathers.

That Moore should not reveal the alleged disgusting unlawful behavior of Bogard to Stokes, Leathers, or the Union is highly implausible. Stokes testified that it was only in the beginning that Moore was reluctant to give any statements to him to support unfair labor practice charges. By now, Moore was undoubtedly well versed in Stokes' dealings with the NLRB and what evidence was desired. Stokes was his close friend, they visited each other's home socially. Stokes actually held union meetings at Moore's home. Leathers was not

only Moore's cousin but they had social relationships of 20 years' standing.

Stokes flatly contradicts Moore and testified with assurance and conviction that Moore did disclose the incident to him on the very day that it allegedly happened. Stokes testified that Moore related to him a different version, i.e., merely that Bogard told him on the roof that "if it wasn't for you [Moore], Scott Leathers, there would be no Russell Stokes and no union," or "something to that effect." Stokes had no recollection of any roof repair that day nor any knowledge of any roof drainage problems at that time. Stokes testified that Moore must be mistaken if he testified that no conversation occurred. On this point, I credit Stokes. I find that Moore did indeed discuss the substance of his testimony with Stokes even before he was contacted by the Board agent. Stokes, whom I credit, testified that he drafted the unfair labor practice charge for Leathers at Leathers' Home and used information he obtained from Moore, that he filed the charge and asked Moore to give a statement to the Board agent.

Thus it is clear that Stokes became intimately involved with and discussed with Leathers and Moore the presentation of evidence to support the second complaint. Stokes is clearly not a disinterested witness. He openly revealed his disfavor with the settlement and obviously, to him, it would be advantageous for it to be set aside so that he might obtain the full \$9000 or more he felt was unjustly deprived of him. Stokes admitted that on numerous occasions during his employment, Bogard infuriated employees enough to want "to hit him" and that he was one of those employees, "and I'll tell you that right now." Thus Moore had the counsel and experience of Stokes, whom we have noted above resorted to secretive tapings in a desperate effort to obtain evidence against Bogard. The rooftop encounter bears a certain resemblance to the fruitless efforts of Stokes, i.e., to an inducement of incriminating statements in a private, personal confrontation.

#### The Credibility of Moore

Centering the analysis of Moore's credibility on Moore himself, I must conclude that he, like Stokes, is a directly interested party. Not only is he alleged to have been adversely affected by Bogard but it would also be to his friend Stokes' advantage to turn aside the settlement, and much more to the advantage of his discharged cousin Leathers of whom he testified, "If he needs me, I'm always there for him." Furthermore, during his cross-examination, although he perfunctorily testified that he respected Bogard as a person, he also, with strong overtones of bitterness in voice and demeanor, alluded to the oppressive 3-month strike by the employees, the protracted negotiations where the employees voted down two contracts proposed to them by the Union for ratification, the unnecessary death of an employee during picketing (apparently a heart attack), and Bogard's lack of regard for the needs of his workers.

The first observation to be reached with respect to Moore's reliability as a witness is that he obviously found it necessary to enhance his testimony by falsely testifying as to his communication with Stokes. There is no other motivation for such conduct. Although the matter falsely testified to is not of itself immensely dispositive, it necessarily obliges the finder of fact to ask the question: At what point

does the witness draw the line at false testimony, or even exaggeration or embellishment in order to enhance his own credibility? On this point alone, Moore's credibility is impaired. To that factor must be added testimonial inconsistency, contradiction, addition to and embellishment of fact on repeated testimony, the likelihood of strong personal bias, and testimony of Respondent conduct strongly out of character with the type of conduct witnessed by much more disinterested witnesses. Finally, the critical conversation of September 12 contains inherent implausibilities. Leathers had been terminated as of September 11 and yet, on September 12, Bogard merely allegedly referred to Leathers' receipt of a cut in hours as punishment and further threatened Moore with a cut in hours, not termination. Secondly, I find it inexplicable that Bogard would confide in Moore his most hostile union animus and only target Moore for his most explicit unlawful intentions. There is no factual basis in the record to support the plausibility of such conduct. Furthermore, it became even more unlikely that Bogard would have done so as late as September 12. By that date, Bogard had been subjected to unfair labor practice charges and Board investigations. He had undergone an election campaign during which he engaged in a comparatively mild effort to defeat the Union and wherein he refrained from threats when such conduct would have been more productive, i.e., before the vote and not after it.

In light of the abundance of serious impediments to Moore's veracity, including a calculating demeanor that was devoid of the kind of spontaneity indicative of uncontrived candor, I am not in a position to conclude with confidence that Moore's uncorroborated testimony is sufficiently reliable to warrant credence. I therefore must credit Bogard's denials.

#### Conclusions

Having thus discredited Moore, I find that the record does not reveal sufficient evidence of knowledge and specific vindictive animosity of the Union and/or other concerted protected activities of Leathers and Moore. Although Respondent's proffered generalized evidence of the reasons for the adverse treatment of Leathers and Moore raises questions and suspicions, it is not demonstrated to be so outrageous or even unreasonable as to necessarily, on its face, warrant an

inference of unlawful motivation, particularly so where I must credit Bogard wherever his testimony conflicts with Moore. With respect to the circumstances of Leathers' reduction in hours and termination, if constrained to make a credibility resolution, I must find that Bogard was somewhat more convincing and plausible than the uncorroborated Leathers, particularly as to the circumstances from May 20 to June 10. As noted above, a not implausible basis for nondiscriminatory motivation was shown regarding Leathers.

I must conclude that the General Counsel has not shown sufficient evidence to warrant an inference that even a partial unlawful motivation caused the adverse treatment of Leathers and Moore and, therefore, insufficient evidence of a prima facie violation was raised so as to shift the burden to Respondent to prove that such conduct would necessarily have occurred regardless of union or other protected activities. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

With respect to the proven allegations that during the preelection period Respondent promised employees benefits, I conclude that, yes, whatever else Bogard intended to say, his words implied promise of unspecified benefits and a vacation plan if the employees rejected union representation. However, not only do I not find such conduct insufficient to justify vacating the settlement agreement of Case 15-CA-10490, but I also find that it is insufficient to warrant the issuance of a remedial Order. The conduct, for the most part, involved context-free promises of an ambiguous nature made during Respondent's mild, ineffectual election campaign and were free from threatening or other seriously coercive conduct. The Union thereafter proceeded to achieve an overwhelming victory and was thereafter supported by not only the employees in an economic strike but also for a time by the assistant manager, Hills, and also the Respondent's bookkeeper. As of the trial, the Union and Respondent have settled into a contractual relationship. I see no useful purpose to pursue further litigation of this matter. The purposes of the Act have been achieved, labor-management stability has been achieved, and the interests of the employees and the public under the Act have been satisfied.

[Recommended Order omitted from publication.]